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In the Supreme Court of the United States

OCTOBER TERM, 1969

No. 882

BOSTON & PROVIDENCE
RAILROAD DEVELOPMENT GROUP,
PETITIONER,

v.

CHARLES W. BARTLETT, TRUSTEE, ET AL.,
RESPONDENTS.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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The Boston & Providence Railroad Development Group, petitioner, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the First Circuit entered in this proceeding on July 24, 1969.

Opinion Below

The opinion of the Court of Appeals is reported at 413 F.2d 137.

Jurisdiction

The judgment of the Court of Appeals for the First Circuit was entered on July 24, 1969. A timely petition for rehearing was denied on August 21. (The mandate went down, following another subsidiary denial of rehearing, on September 2.) **Jurisdiction rests on 28 U.S.C. 1254(1).**

Questions Presented

In administering the Bankruptcy Act the dispositions of the district court supported by the Court of Appeals (against the interests of the debtor and its stockholders) raise these questions of due process, confiscation, and legal error:

1. May stockholders obtain judicial review of the provisions of a Section 77 plan of reorganization (never reviewed) for their railroad corporation — given the explicit statutory provision for such judicial review in subsection (f)?

2. May the plan force sale of the debtor's main line railroad to another company for use as a railroad, but at mere scrap value — notwithstanding the recent *Hudson Tubes* decision?

3. May the stockholders obtain an adjudication of the $4,801,000 claims of certain old debentures, when (a) equity and Section 77 limit participating creditors to those having proved claims, (b) the debentures have not been proved but have been persuasively denounced as invalid, (c) the plan forcibly allows their claims at full face amount costing the stockholders more than $100 per share, (d) refusal to adjudicate them for disallowance keeps the property in captivity and excludes a far more favorable settlement?

4. May the stockholders have the court proceed for conversion of surplus properties of the debtor to the Common-

wealth of Massachusetts (for highway and rail transit uses) on a nonrecurring opportunity to produce sufficient proceeds to free the debtor from bankruptcy?

5. May the stockholders obtain an adjudication of the debtor's Class I common carrier status in order to obtain vital resulting benefits (including fair divisions of rates from the through traffic) and proper annual reports?

Statutory Provision Involved

This proceeding is governed by Section 77 of the Bankruptcy Act, 11 U.S.C. 205.

See subsection (f):

> (f) Upon confirmation by the judge, the provisions of the plan and the order of confirmation shall, subject to the right of judicial review, be binding upon the debtor, all stockholders thereof, including those who have not, as well as those who have, accepted it, and all creditors, secured or unsecured, ...

Statement of the Case

The Boston & Providence Railroad Corporation built and owns the main-line railroad between those important cities, which is destined to become the head of the high-speed Northeast Corridor route. In 1888 B&P leased its railroad enterprise for a term of 99 years. The lessee agreed to pay the interest on B&P's debt ($2,170,000 in debentures) and to retire the principal during the term of the lease without expense to B&P. The lessee set up a sinking fund for that purpose.

In 1935 the New Haven Railroad Company, the lessee, went into its first Section 77 trusteeship. When the debentures fell due in 1938 New Haven's trustees defaulted

on the principal and interest and rejected and terminated the old B&P lease.

B&P, as surety for New Haven on the debentures, was caught by New Haven's default and was forced thereby into B&P's present separate Section 77 trusteeship. New Haven's trustees, however, retained B&P's lines for operation on a special agency account for B&P, the owner. A long controversy ensued over New Haven's peculiar method of allocating $220,000,000 in joint net railway operating income during the agency period through 1957 to New Haven, none to B&P. No accounts have been approved.

After the present petitioner (an independent B&P stockholder group) had obtained a 1958 clarifying amendment to paragraph (c)(6) of Section 77 affirming B&P's common carrier status with full rights to fair divisions of through rates collected from the public, New Haven offered to forget the accounting and to buy in B&P's assets on a basis to pay B&P stockholders $300 per share. Meanwhile New Haven paid off the holders of the old debentures and acquired the debenture paper. (New Haven's court had conceded B&P's claim against New Haven on the debentures.)

The present plan. New Haven's present trusteeship dumped the $300 basis in favor of a basis to pay the stockholders only $110 per share. This plan calls for New Haven to pay $4,991,000 in new bonds (N.H. trustees' obligations). N.H. would also pay $2,284,700 in cash for $110 per share on B&P's 20,770 publicly-held shares, and would contribute $1,750,980 in the form of 15,918 B&P shares cancelled at $110 each.

New Haven's real estate officer estimated B&P's scrap value at $9,500,000. Some accounting legerdemain was added to bring the face amount of the plan price $9,026,680 up to scrap value, which was then (before the 1967 *Hudson Tubes* decision) regarded as minimum just compensation.

The plan required B&P to apply the $4,991,000 new bonds to "pay" the old debentures. (But New Haven has conceded that if B&P is not liable to New Haven on the old debentures, the new bonds may go to B&P's stockholders — at $124.90 per share, plus interest from 1964.)

New Haven got a Wall Street stockholders committee to support its $110 plan. On petitioner's opposition, however, the proponents failed to prove that their price was fair. Thereupon New Haven agreed to allow B&P stockholders to participate in proceeds of New Haven's future sales of B&P surplus real estate for *non-railroad* uses. That concession has been gravely weakened by the fine-type clause added to the plan — New Haven is to decide what real estate to sell, and when to sell it, and will apply the proceeds first to pay taxes and expenses generated by the sale (including N.H. removal and relocation costs). The B&P stockholders, holding certificates of beneficial interest, may participate *if* the proceeds exceed $500,000 per sale and *if* New Haven (or its successor) shall make the sale before 1979.

At the end of 1968 New Haven turned over its railroad business to the Penn Central Company, which would acquire New Haven's rights in B&P's properties under the plan (without N.H.'s accrued tax losses). Penn Central is now operating B&P's lines as a temporary agent without any agreement with B&P.

Meanwhile B&P's property values have risen and will continue to rise. Most important looms the coming federal Boston-Washington high-speed railroad corridor. (Connecticut and New York are already taking over the section between New York and New Haven for $80,000,000, according to current press reports.) The plan bars B&P stockholder participation in the corridor, since that would be railroad use, for which the plan only allows B&P scrap value. B&P Providence and Boston real estate offer re-

markable opportunities for development. Under the present plan these properties can be expected to lie fallow until the B&P stockholders shall be finally washed out at the end of 1978. *Absent* the plan the B&P owners can do far better.

The Commission approved the plan *only* on the condition that the district court should find the debentures valid — otherwise it would be adjusted to allocate the new bonds to the stockholders. The district court has refused to pass on the debentures, but issued an interlocutory order approving the plan for submission to the security holders. Despairing of judicial relief, most of the security holders therefore voted for the plan. (The illusory elements in the real estate clause were not yet apparent to the average stockholder.)

The district court's final order. On November 4, 1968, the district court entered its final order, which confirmed the plan. Petitioner sought appellate review of the plan, invoking the judicial review clause in Section 77 (f).

The Court of Appeals perceived that petitioner had sought judicial review of the plan following the earlier interlocutory order of approval. Petitioner had not obtained judicial review then; the effort was unsuccessful, and the Supreme Court declined to compel review — doubtless being influenced by the interlocutory stage of the proceedings. In its present opinion the Court of Appeals says that petitioner should not get double judicial review of the provisions of the plan — which petitioner concedes.

Petitioner has been unable to get the plan reviewed once. In order to get active administration of the judicial protection contemplated by Section 77, petitioner filed some administrative motions which languished in the district court. Eventually petitioner treated the court's protracted inaction as denial *sub silentio*. One motion asked the court to pass on the debentures. Another asked it to proceed for

conversion of a B&P route for a highway and rail transit suburban corridor, then desired by the Commonwealth. (A large part of the opportunity has been lost this year, given the court's inaction and New Haven's and Penn Central's calculated inertia.) Another asked the court to require B&P to be treated as a carrier according to the requirements of paragraph (c)(6) of Section 77 and to file annual reports properly. (See Question 3, 4, 5.)

The Court of Appeals recognizes the denials *sub silentio.* (See footnote 6 in its opinion.) But it says that (although earlier appeal before confirmation would have been too soon) now appeal is too late.

The B&P proceedings represent an intolerable breakdown of judicial protection.

Reasons for Granting the Writ

The careful judicial administration of the protective procedures of the Bankruptcy Act is a matter too important to be slighted.

The B&P controversy is sizeable and important. Railroad reorganizations are public affairs. The regional public interest in obtaining full imaginative utilization of B&P's properties in urban renewals flows with petitioner's interest in obtaining fair value for the stockholders instead of multi-million-dollar judicial confiscation through forced sale and forfeiture.

Public confidence in judicial administration is at stake. Due process is denied.

The First Circuit has departed so far from the accepted and usual course of judicial proceedings as to require this Court's supervision. Its refusal to review the provisions of the plan of reorganization once is without precedent. It directly violates the plain review clause of Section 77(f). "Upon [i.e., *after*] confirmation by the judge, the pro-

visions of the plan and the order of confirmation shall, subject to the right of judicial review, be binding ..." Nothing can be plainer than that.

No precedent supports the First Circuit's double refusal. The precedents in other circuits conflict. To be sure, in several cases review of the plan was obtained after the interlocutory order of approval—and doubtless one review of the plan would be enough. But in two major Section 77 cases in the Seventh and Tenth Circuits the plan was judicially reviewed after confirmation. *In re Chicago & N. W. Ry. Co.*, 126 F.2d 351, 354; *In re Denver & R. G. Ry. Co.*, 150 F.2d 28, 33. Protective appeals from a preliminary approval order lay in abeyance for consideration with subsequent appeals against the plan that were not filed until after confirmation.

The First Circuit's first refusal could be condoned as interlocutory. But its second refusal is final. The combination forms a procedural avoidance that cannot be tolerated in 1969.

The language of subsection (f) was added to Section 77 by amendment after extensive hearings. (Hearings on H.R. 6249, April 1935.) Cassius M. Clay, Esq., the distinguished railroad counsel to the sponsoring R.F.C., explained its importance, saying:

> "We are dealing with a vital thing here, of course. The sentence refers to the final order of the court confirming the plan."

The purpose was to insure the right to judicial review of the provisions of the plan at the critical moment when it would become binding. Section 77 does not call for earlier review of the plan. A practice of allowing judicial review after the interlocutory order of approval cannot be taken

as foreclosing the *statutory right* to judicial review following confirmation.

Thus Section 77 accords with parallel provisions for non-railroad corporations. See *Collier on Bankruptcy,* James William Moore, editor-in-chief, 14th ed., vol. 6, ¶ 7.41:

> "But approval of a plan does not mean that the plan will automatically be confirmed. . . .
>
> Those objecting to confirmation, therefore, may assert any ground which prevents confirmation under § 221, whether it is new or was previously presented as a bar to the approval of the plan."

The present plan has never been reviewed.

The old scrap value test of minimum just compensation for condemning a railroad (or forcing a judicial sale through a plan of reorganization) for use as a railroad was rejected in *Port Authority Trans-Hudson Corp.* v. *Hudson Rapid Tubes Corp.*, 20 N.Y. 2d 457, 231 N.E. 2d 734 (1967). (This Court denied certiorari in 1968). The B&P plan requires sale of the railroad for use as a railroad at scrap value. It is a scrap value plan (except for contingencies in non-railroad real estate). It thus conflicts with *Hudson Tubes.*

Closer to home, it conflicts with the 1967 Massachusetts decision, *Commonwealth* v. *Massachusetts Turnpike Authority,* 352 Mass. 143, 147, 224 N.E. 2d 186.

Conclusion — simple and just solution

For the foregoing reasons petitioner prays this Court to grant the writ. It can simply require the Court of Appeals to review the plan; in this way the Supreme Court need not get involved in the plan issues on their merits. If the Court of Appeals were so instructed, it would pre-

sumably review the plan justly and quickly. That should benefit the public interest and would probably improve the B&P owners' lot by $10,000,000. It would restore confidence in the judicial process.

Respectfully submitted,

ARMISTEAD B. ROOD
Attorney for Petitioner

November 19, 1969

APPENDIX A

United States Court of Appeals
For the First Circuit

No. 7300.

In the Matter of
BOSTON & PROVIDENCE
RAILROAD CORPORATION,
DEBTOR,

BOSTON & PROVIDENCE RAILROAD
DEVELOPMENT GROUP,
APPELLANT.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

Before ALDRICH, *Chief Judge*,
MCENTEE and COFFIN, *Circuit Judges*.

Armistead B. Rood, *Joseph B. Hyman* and *Lawrence T. Perera* for appellant.

Robert W. Meserve, with whom *Benjamin H. Lacy*, *Charles W. Mulcahy, Jr.*, *Laurence M. Channing*, *Rya Featherston*, *James Garfield*, *Nutter, McClennen & Fish*, *Mulcahy & Mulcahy*, *Hill & Barlow*, and *Choate, Hall & Stewart* were on brief, for appellees.

July 24, 1969.

MCENTEE, *Circuit Judge*. Efforts have been underway since 1938 to reorganize the Boston & Providence Railroad Corporation (debtor) in accordance with § 77 of the Bankruptcy Act, 11 U.S.C. § 205. Understandably, various plans have been spawned during the more than thirty years since that time. It will be sufficient for our purposes, however,

to trace the history and frustrations of the last of these efforts, the 1966 plan.[1]

This plan was approved in 1966 by both the Interstate Commerce Commission, see *Boston & Providence R. R. Reorganization,* 327 I.C.C. 10 and by the District Court for the District of Massachusetts. See *In re Boston & Providence R. R.,* 260 F.Supp. 415 (1966) [2] and an appeal to this court by the Boston & Providence Stockholders Development Group (Group),[3] the appellant herein, was dismissed in 1967 for want of diligent prosecution, *cert. denied,* 389 U.S. 974 (1967). Thereafter the plan was approved by the creditors and stockholders, and after one further trip back to the Commission for reconsideration, see *Boston & Providence R. R. Reorganization,* 333 I.C.C. 713 (1968), it was at long last confirmed by the district court.

By now the central issue before us is relatively simple: Can the Group, under the guise of an appeal from the confirmation order, relitigate the issues that were settled against it by the dismissal of its appeal from the district court's order approving the reorganization in 1966? The answer must be in the negative.

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[1] One interested in a further history of these transactions may profitably consult the detailed opinion of this court in *Freeman* v. *Mulcahy,* 250 F.2d 463 (1st Cir. 1957), *cert. denied,* 356 U.S. 939 (1958).

[2] The provisions of the 1966 plan are analyzed in the district court's opinion.

[3] The Group, representing approximately ten per cent of the debtor's stock in the public class, first came on the scene in 1954 because of dissatisfaction with the provisions of a suggested plan of reorganization then current. It has been most active in the subsequent stages of litigation. It apparently adopted the Development Group title because of what it regarded as a particular concern to develop B. & P. properties, especially through realization of the increasing values of properties in nonrailroad uses. The Group is to be distinguished from the Boston & Providence Railroad Corporation Stockholders Committee, which holds the bulk of B. & P. stock in the public class and was the original sponsor of the pending plan.

The district court found in substance that the plan had been accepted by the requisite proportion of creditors and stockholders of each class to which submission was required and that these acceptances were not made or procured by any means forbidden by law. It is the debtor's position [4] that only questions arising in connection with the confirmation order and any change in circumstances since the approval order are still open on this appeal. The Group, on the other hand, contends that it is free to raise questions as to whether the underlying plan, long since approved, is fair and equitable.

We start with the statute:

> "Upon confirmation by the judge, the provisions of the plan and of the order of confirmation shall, subject to the right of judicial review, be binding upon the debtor, all stockholders thereof, including those who have not, as well as those who have, accepted it, and all creditors secured or unsecured, whether or not adversely affected by the plan, and whether or not their claims shall have been filed, and, if filed, whether or not approved, including creditors who have not, as well as those who have, accepted it." 11 U.S.C. § 205(f).

The Group contends that it is clear from the wording of this statute that judicial review is available "upon confirmation" both of the order of confirmation and of the provisions of the plan. They cite *In re Chicago & N. W. Ry.*, 126 F.2d 351, 354 (7th Cir. 1942), *cert. denied*, 318 U.S. 793 (1943) and *In re Denver & R. G. W. Ry.*, 150 F.2d 28, 33 (10th Cir. 1945), *rev'd on other grounds*, 328 U.S. 495 (1946), as instances in which such review was actually accorded.

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[4] The appellees in this case include not only the debtor but also B & P Railroad Corporation Stockholders Committee, a Trustee in Reorganization of the B. & P. and a Trustee in Reorganization of the New York, New Haven and Hartford Railroad Company.

In our opinion, however, this interpretation is not compelled either by the terms of the statute or by the cited cases. The terms of the statute are merely congruent with the situation that arises when no appeal at all is taken until after confirmation and thus both appeals can be consolidated. In such a case the entire review would take place after confirmation. But the essence of the statute is that review of both approval and confirmation be available, not that they both be available after confirmation. The two cases cited by the Group may be thus explained. In neither is there any discussion of a prior review of approval. Rather, in these cases it was possible to consolidate all the issues into one appeal.[5]

We assume, without deciding, that appellant had an election of whether to appeal from approval or confirmation. Appellant appealed unsuccessfully from the district court's order of approval and it must be bound by its action. To be sure, the appeal was not considered on its merits but unlike dismissal of a complaint, dismissal of an appeal always involves prejudice in the ordinary case because the period for appeal will have lapsed. The result should not be different in a chapter 77 case merely because of the subsequent act of confirmation. To hold otherwise would permit appellant to delay and put its adversaries to great expense at no cost to itself.

While this discussion disposes of the Group's appeal for the most part, a few additional comments are in order.

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[5] In addition, *Denver*, *supra*, was a case in which certain creditors whose approval was necessary had not accepted the plan. This provided a special basis for examining the merits of the plan for the protection of these dissenting creditors under § 205(e): "*Provided*, That if the plan has not been so accepted by the creditors and stockholders, the judge may nevertheless confirm the plan if he is satisfied and finds, after hearing, that it makes adequate provision for fair and equitable treatment for the interests or claims of those rejecting it, that such rejection is not reasonably justified in the light of the respective rights and interests of those rejecting it and all the relevant facts. . . ."

The Group also complains that the plan is defective in limiting the payment of all reorganization expenses to a figure less than the allowances approved or to be approved by the Commission. This appeal was presented twice on oral argument. After the first argument, we specially requested the Commission to consider the Group's interpretation of the plan on this point. Subsequently, the Commission, considering this matter on an expedited basis, ruled that the pertinent section of the plan does not impose a maximum limit on the amount of the administration claims but governs the amount to be kept available at the time of consummation of the plan; and that accordingly there is no need for the plan to be amended. Thus the Group's complaint in this regard is based on an incorrect factual premise.

Whatever the original merits of the plan, the Group now contends that it must be reassessed in the light of *Port Authority Trans-Hudson Corp.* v. *Hudson Rapid Tubes Corp.*, 20 N.Y.2d 457, 231 N.E.2d 734, 285 N.Y.S.2d 24 (1967), which rejected the scrap value test as the sole standard of valuation. But the Commission has already concluded that *Hudson Tubes* does not constitute a "new development" such that reconsideration of the plan would be justified. *Boston & Providence R. R. Reorganization*, 333 I.C.C. 713, 718 (1968). In any event, it is not true that the plan in question here takes only scrap value into account. The plan provides, in addition to an outright payment to stockholders, for Certificates of Contingent Beneficial Interest to allow further receipts for stockholders in the event that the potential for sale of real estate for nonrailroad uses should be realized. See *In re Boston & Providence R. R.*, *supra* at 418. If there should be occasion for applying the *Hudson Tubes* rule to B. & P. property, the resulting benefit would enure to the certificate holders.

The last contention to be considered may be dismissed summarily. The Group complains that the vote of the stockholders approving the plan was induced by representations of tax benefits that are not materializing. We need only remark that nothing in the record before us has been suggested that supports these allegations concerning what motivated the stockholders.[6]

We, therefore, conclude that the district court did not err in confirming the Plan of Reorganization and did not abuse its discretion in denying the Group's motion of November 4, 1968, to return the plan to the Commission.

Affirmed.

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[6] On May 23, 1969, the Group filed a "Supplemental Notice of Appeal" (Docket Number 7350) in connection with the following denials of the district court. (1) Denial of the Group's Motion of September 26, 1966, for the District Court to decide whether B. & P. is liable on certain debentures. (2) Denial of the Group's petition of August 23, 1965, for the District Court to proceed for the accomplishment of major sales of properties of B. & P. in the Boston area. (3) Denial of the Group's Motion of April 3, 1959, for an order declaring B. & P. a class I line-haul carrier and not a mere lessor. (4) Denial of an amended Motion in connection with 3, *supra*, filed on or about October 16, 1963.

The debtor has moved to dismiss these appeals as untimely and we think that its motion must be granted. The district court never actually denied said motions and petition and it is the Group's theory that at some point it ought to be able to treat them as denied *sub silentio*. This may well be true but if they were denied by implication at all, this surely occurred no later than when the district court confirmed the plan on November 4, 1968. In view of the above we need not consider the debtor's "Second Motion to Dismiss Appeals" and the Group's answer thereto.